90-1702

No. _____

Supreme Court, U.S.
FILED
APR 26 1991
OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1990

LANDIS BROTHERS,

Respondent,

v.

GREGG POTATO SALES, INC.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

DID APPELLANT MEET THE STATUTORY REQUIREMENTS OF 7 U.S.C. Sec. 499g(c) (1988) WHEN IT TIMELY FILED ITS APPEAL BOND (SECURED BY A BANK CERTIFICATE OF DEPOSIT BEARING INTEREST AT THE RATE OF 8.4%) IN THE AMOUNT OF $40,000 TO SECURE PAYMENT OF AN AWARD OF $26,971.41, ACCUMULATED INTEREST TO THE DATE OF THE AWARD OF $8,511.73, ATTORNEYS' FEES AND EXPENSES OF $1,286.46, AND INTEREST FROM THE DATE OF THE AWARD TO THE FILING OF THE BOND OF $13.94, FOR A TOTAL AMOUNT DUE UNDER THE AWARD OF $36,783.56?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Gregg Potato Sales, Inc., and the respondent Landis Brothers.

Petitioner Gregg Potato Sales, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1

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In the

Supreme Court of the United States

___ Term, 1991

LANDIS BROTHERS,

Respondent,

v.

GREGG POTATO SALES, INC.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Gregg Potato Sales, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on February 25, 1991.

OPINIONS BELOW

The per curiam unpublished opinion of the Court of Appeals for the Eighth Circuit is reprinted in the Appendix, p. A-1, *infra*. The Order and Memorandum of the United States District Court for the District of North Dakota has not been reported. It is reprinted in the Appendix on p. A-4, *infra*.

JURISDICTIONAL STATEMENTS

The unpublished per curiam opinion was filed February 25, 1991, the Judgment dated February 25, 1991, and mandate issued March 20, 1991 and filed March 27, 1991.

A Writ of Certiorari may be granted when a Federal Court of Appeals has rendered a decision in conflict with another Federal Court of Appeals on the same matter. Here, the decision of the Eighth Circuit Court of Appeals is in conflict with the decisions of the Ninth Circuit Court of Appeals. Rule 17 of the Rules of the Supreme Court of the United States.

STATUTE INVOLVED

7 U.S.C. §499g(c). Appeal from reparation order; proceedings

Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: *Provided*, that in cases handled without a hearing in accordance with subsections (c) and (d) of section 499f of this title or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. Such appeal shall be perfected by the filing with the clerk of said court a notice of appeal, together with a petition in duplicate which shall recite prior proceedings before the Secretary and shall state the grounds upon which the petitioner relies to defeat the right of the adverse party to recover the damages claims, with proof of service thereof upon the adverse party. Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant, conditioned

upon the payment of the judgment ordered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at lease equivalent to the amount of the bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify and file in said court a true copy of the Secretary's decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court.

STATEMENT OF THE CASE

After an administrative hearing before the Secretary of Agriculture, the aggrieved party, Gregg Potato Company, filed a Notice of Appeal and a Bond secured by a Certificate of Deposit which bears interest at 8.4%. 7 U.S.C. §499 g(c).

While the Bond was not double the award as required by statute, it more than covered the award, interest and costs and was filed under the authority of *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976).

The District Court held the appeal to be ineffective and ordered dismissal of the same. Appellant filed its Notice of Appeal to the 8th Cir. Court of Appeals and filed a motion to set the amount of the Appeal and Cost Bond. The United States District Court for the District of North Dakota ordered an additional bond in the sum of $14,000 to be deposited and thereafter approved the Bond.

Upon the filing of the unpublished per curiam decision of the United States Court of Appeals affirming the trial court, the appellant herein seeks a Writ of Certiorari to the United States Supreme Court.

STATEMENT OF FACT

A Complaint was filed by Landis Brothers against Gregg Potato Sales, Inc. on June 25, 1987 under the Perishable Commodities Act of 1930, as amended (7 U.S.C. §499a, *et seq.*.). Gregg Potato Sales, Inc. answered and counterclaimed for monies due it from Landis Brothers and Phillip Landis, Sr.

The Complaint alleged an oral contract for the sale of approximately 21 truckloads of bulk white Norchip potatoes at $3.25 cwt., less shipping charges, leaving a net sales price of $2.95 cwt. The Complaint also claimed that 9,038.8 cwt. were sold under the oral contract.

Respondent claimed that the oral contract was one of consignment, due to the fact that the potatoes were frost damaged at the time of harvest and storage and had no value as No. 2 white potatoes and that Respondent agreed to attempt to market the potatoes on a consignment and brokerage basis. The Respondent was thereafter owed the sum of $9,856.00 for freight and seed potatoes sold but not paid for.

A hearing was had before Donald A. Campbell, Judicial Officer of the Office of the Secretary of Agriculture. Hearing Officer Campbell found for the complainant on all counts. He thereafter ordered payment of $26,971.43 with interest at the rate of 13% from December 1, 1986 until paid; that he allowed Petitioner's reparation fees and expenses of $1,286.46 with interest at the rate of 13% on this amount from the date of the Order which totaled $36,769.62 on May 1, 1990.

Respondent perfected its appeals to the United States District Court, District of North Dakota, Fargo, North Dakota, on the 4th day of May, 1989, and filed the required Notice of Appeal, Petition, and Supersedeas Bond in the principal sum of $40,000 by way of a Certificate of Deposit that bears interest at the rate of 8.4% per annum.

Upon motion of the Respondent Landis Brothers, the District Court for the District of North Dakota dismissed the appeal upon the ground that the appeal was ineffective.

REASONS FOR GRANTING THE WRIT

WAS THE APPEAL EFFECTIVE WITH A TIMELY BOND (CERTIFICATE OF DEPOSIT) FILED IN THE AMOUNT OF $40,000 EARNING INTEREST AT 8.4%?

The Eighth Circuit Court of Appeals has ruled that a timely filed bond in a sum less than the statutory requirements of double the amount of the award, including interest, costs and attorneys' fees, but in a sum more than sufficient to protect the appellee did not meet the jurisdictional requirements of 7 U.S.C. §499.g(c).

Appellant timely filed its appeal and timely filed a bond supporting its appeal by a Certificate of Deposit bearing interest at the rate of 8.4% per annum and relied upon the Ninth Circuit Court's decision of *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976) for authority to file a bond in less than double the amount of the award, plus costs. Had the appellant been obligated to file a bond in the sum of double the amount, a bond in the sum of $80,000 would have had to have been filed which would have been financially impossible for the appellant to do. Consequently, the Bond itself recited the authority of *O'Day* for its reason for filing a bond in less than double the amount.

At the outset, it is clear that 7 U.S.C. §499 g(c) provides, in part:

> Such appeal shall be perfected by filing with the clerk of said court a notice of appeal, together with a petition in duplicate which shall recite prior proceedings before the Secretary and shall state the grounds upon which the petitioner relies to defeat the right of the adverse party to recover the damages claimed, with proof of service thereof upon the adverse party. Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation

> awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States.

7 U.S.C. §499g(c).

The purpose of supersedeas and appeal bonds is to provide security to the prevailing party before the Secretary of Agriculture and provide assurance that awards will be promptly paid.

The statute giving the aggrieved party the right to appeal does not provide for a mechanism to review or have the court judicially determine the supersedeas or appeal bond in the District Court, as is generally provided for in F.R.A.P. §7 and §8(b).

The bond of $40,000 in the form of a bank Certificate of Deposit bearing interest at the rate of 8.40% was filed as security supporting the Appeal Bond. At the time of the appeal to the United States District Court, the amount ordered to be paid by the administrative law judge was as follows:

Reparation Award	$ 26,971.43
Interest to May 1, 1989	8,511.73
Cost, including attorneys' fees	1,286.46
Total:	$ 36,769.62

The bond filed under 7 U.S.C. §499g(c) was $40,000, a Certificate of Deposit bearing interest at the rate of 8.40% and was $3,230 more than necessary to pay the award, plus interest and costs. The costs on appeal would certainly be less than the $3,230 excess filed; consequently, the

appellee/respondent Landis Brothers was fully protected by the bond filed in United States District Court.

As of the date of Judge Webb's Order, May 1, 1990, the Certificate of Deposit had earned interest of $3,332 and therefore was worth $43,332.00. The filing of the Certificate of Deposit was accomplished after some difficulty in arranging for the Certificate of Deposit with loan officers of the First American National Bank of Crookston, Minnesota.

The total that appellee might receive, including the award, costs and interest to the date of Judge Webb's Order, is as follows:

Reparation Award	$26,971.43
(Interest at 13% to May 1, 1990)	$ 11,504.10
Reparation Cost	$ 1,286.46
(Interest at 13% to May 1, 1990)	$ 179.12
Total:	$ 39,941.11

Consequently, the Bond, as filed, was and continues to be ample security for the prevailing party.

The aggrieved party and appellant relied upon the 9th Circuit Court case of *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976) which held that the double-bond requirement heavily burdens the statutory right to appeal. While a state could require adequate security to preserve an award already made and otherwise protect appellee against loss during appeal, the Court observed that the double bond requirement did not effectuate these purposes in the circumstances. The claim that the double-bond requirement screened out frivolous appeals was all "unpersuasive, for it not only bars non-frivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." the *O'Day* court relied upon the rationale of *Lindsey v. Normet*, 405 U.S.56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), which held that the Equal Protection clause was

violated by a provision of the Oregon Forcible Entry and Wrongful Detainer Statute requiring a lessee who wished to file a bond for the payment of twice the rental value of the premises from the time the action was commenced until final judgment. The Supreme Court said:

> When an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.

Id. at 77, 92 S.Ct. at 876. The *O'Day* court further held that the state may properly condition the right to appeal upon posting security sufficient to protect appellee from loss of damages already awarded, interest, and costs on appeal, including a reasonable attorneys' fee.

The court went on to say that to the extent that the bond required by 7 U.S.C. §499g(c) reflects the amount of the reparation award, it directly serves a valid purpose. The automatic doubling of this amount, however, has no rational relationship to the payment of interest on the award and costs of appeal. If the claim is small, the product will be wholly inadequate; if the claim is large, as in this case, it will be grossly excessive. Risk and security will coincide only fortuitously, if at all.

The court went on to state that since Congress has clearly manifested its intention to require a bond sufficient to secure payment of a reparation award, interest, and costs on appeal, including reasonable attorneys' fees; since the remaining question (the appropriate amount of such a bond) is peculiarly within judicial rather than legislative expertise; and since Congress has expressly provided that the statute is to be upheld in any application in which it is valid (7 U.S.C. §499g), the statutory provision may be sustained to the extent that it requires such a bond, even though it must be invalidated to the extent that it requires a double-bond not approximating this amount.

The *O'Day* court then held that the district court should fix a bond in the amount of the reparations award,

including appellee's reasonable expected costs, interest, and attorney's fees on appeal, and upon the posting of such a bond, the court should proceed to adjudicate the claim as provided for by the statute.

The 9th Circuit again has occasion to review this matter in *Saharoff v. Stone,* 638 Fed.2d 90 (9th Cir.1980). In that case, a commodities trader failed to file a bond in a similar appeal from an administrative proceedings. Another panel of the 9th Circuit, without deciding the validity of the double bond requirement, reduced the amount of the bond to $11,500 which included the reparations award, plus interest and costs on appeal. The *Saharoff* court followed *O'Day* and held that the congressional intent was to require a bond to secure the award. It further held that determination of the amount is a peculiarly judicial function, and the Act is by its terms to be upheld in any valid application. the Saharoff case, even after the 9th Circuit panel reduced the amount, failed to provide a bond and the appeal was thereafter dismissed.

It is appellant's position that if Judge Rodney Webb, upon motion of the prevailing party, felt the appeal bond to be inadequate (which it clearly was not, since it more than covered all of appellee's costs) he should have allowed the bond as filed, or given appellant additional time to file any additional bond or security on appeal to this court. Judge Webb provided that there should be an additional bond of $14,000. This is quite puzzling, but nonetheless, that Order was complied with by the appellant, and the matter is now before this court.

The appellant has now filed with the District Court two (2) Certificates of Deposit which total $54,000 for appeal and supersedeas bonds on a claim which, in its entirety, is approximately $40,000. In addition, the interest earned on the initial Certificate of Deposit brings the total value of the bonds and its' security to approximately $57,000.

The hearing had before the Secretary of Agriculture can clearly be said to be less than fair and impartial. For that reason, appellant is afforded a trial de novo in the District Court. It has been frequently recognized that the principal

purpose of the Perishable Agricultural Commodities Act of 1930 is to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities. Perishable Agricultural Commodities Act, 1930 §§ *1et. seq.* (c), 7 U.S.C. §499A *et. seq.*, §499 g(c). *See O'Day v. George Arakelian Farms, Inc., Id.*

In most jurisdictions in the United States, a nominal cost bond is deemed to be jurisdictional in perfecting an appeal. However, most jurisdictions do not require a supersedeas bond to be filed since that merely stays the execution of any judgment. An appellant is given the option of filing a supersedeas bond to stay the judgment or, if that is not possible nor practical, proceeding with the appeal without the same but imposing upon it the requirement of filing a nominal cost bond. In this instance, Gregg Potato Sales, Inc. is located in Crookston, Minnesota but, for the convenience of counsel and the administrative law judge or hearing examiner, the matter was heard in Grand Forks, North Dakota, a larger community but only 25 miles from Crookston. All of the activity between the broker and the farmer occurred in Grand Forks County, North Dakota and consequently, the *purposes of the Perishable Agricultural Commodities Act of 1930 did not exist.* In this instance, the potatoes had spoiled in a warehouse in Grand Forks, North Dakota and subsequent disposal attempts were made by Gregg Potato Sales, Inc. on behalf of Landis Brothers.

CONCLUSION

Because the administrative procedure and the Perishable Agricultural Commodities Act is so heavily biased and weighted in favor of a shipper, a licensee such as Gregg Potato Sales, Inc. has been deprived of a fair and impartial trial. No doubt that is why de novo trials are allowed on appeal in the United States district court where the matter can be impartially and objectively tried. This matter involved a disputed contract, disputed price, disputed quality and a claim for seed potatoes that were not paid for by Landis Brothers and/or Phillip Landis, Sr. No prejudice can be shown by the appellee, as the appellee is more than adequately protected by the Bond and bonds that were filed. Justice certainly will not be served unless the Order of United States District Court for the District of North Dakota is reversed and this matter is allowed to proceed to trial de novo.

We respectfully ask this court to reverse the decision of the Eighth Circuit Court of Appeals and to reverse the Order of the Honorable Rodney Webb, District Court Judge, and hold that the appeal as filed was effected.

DATED: April 8, 1991

Respectfully submitted,

DICKEL, JOHANNSON, TAYLOR
& RUST

By _____
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COUNSEL OF RECORD

APPENDIX

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Unpublished Per Curiam
Filed February 25, 1991 ..... A-1

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Order and Judgment
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Decision and Order
Dated April 5, 1989 ..... A-8

United States Court of Appeals

For The Eighth Circuit

No. 90-5256ND

Landis Brothers, *Appellee,* v. Gregg Potato Sales, Inc., *Appellant.*	**Appeal From The United States District Court For The District Of North Dakota.** **(UNPUBLISHED)**

SUBMITTED: FEBRUARY 12, 1991
FILED: FEBRUARY 25, 1991

Before MAGILL, BEAM, and LOKEN, Circuit Judges

PER CURIAM.

This action arises out of a reparation proceeding before the Department of Agriculture in which Gregg Potato Sales was found to owe Landis Brother some $27,000, plus interest, for seed potatoes purchased by Gregg. Gregg appealed to the district court, as authorized by 7 U.S.C. §499g(c) (1988). That section provides, in relevant part:

> Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment

entered by the court, plus interest and costs . . . .

Id. Gregg posted a bond for only $40,000. On Landis Brothers' motion, the district court dismissed the appeal for failure to meet the statutory requirements. Gregg now appeals that dismissal, and we affirm.

The bond requirement is jurisdictional. *Kessenich v. Commodity Futures Trading Comm'n*, 684 F.2d 88, 91-92 (D.C. Cir. 1982); *see also Chicago Commodities, Inc. v. Commodities Futures Trading Comm'n*, 811 F.2d 1262 (9th Cir. 1987). Because Gregg did not fulfill all the requirements of §499g(c), it never effectively appealed. Therefore, the district court never acquired jurisdiction.

Gregg relies now, as it did below, on *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), which held that double bond requirement of §499g(c) was unconstitutional. As the district court pointed out, however, the *Arakelian* court found the requirement of a bond of double the award unconstitutional only as applied to would-be appellants unable to afford such a bond. Gregg has never claimed that it is unable to pay for a bond in the proper amount. We therefore affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

For The Eighth Circuit

No. 90-5256ND

Landis Brothers,
Appellee,
v.
Gregg Potato Sales, Inc.,
Appellant.

Appeal From The United States District Court For The District Of North Dakota.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 25, 1991

Let the within MANDATE be filed and entered on the Clerk's Records.

Dated this 27th day of March, 1991

RODNEY S. WEBB, JUDGE
UNITED STATES DISTRICT COURT

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 3/20/91

In The United States District Court
For The District Of North Dakota
Northeastern Division

Landis Brothers, *Appellee,* v. Gregg Potato Sales, Inc., *Appellant.*	**CIVIL NO. A2-89-75**

ORDER

Before the court is Appellee's motion to dismiss the appeal filed with the court pursuant to 7 U.S.C. §499g(c). Appellant, Gregg Potato Sales, Inc., appeals from a reparation order entered against it on April 5, 1989. The Landis Brothers seek the dismissal of the appeal on the grounds that it is statutorily deficient.

An appeal filed pursuant to 7 U.S.C. §499g(c) must be filed with ". . . . a bond in double the amount of the reparation awarded against the appellant . . . plus interest and costs . . ." Gregg Potato Sales, Inc., posted an appeal bond of $40,000 and contemporaneously filed a Certificate of Deposit in the principal sum of $40,000.00, endorsed over to this court. The Certificate of Deposit bears interest at 8.4% per annum. The bond amount is not double the reparation award of $26,971.43 and may not completely cover the accruing interest and costs awarded.

Gregg Potato Sales, Inc., relies on a Ninth Circuit case which held the double bond requirement was unconstitutional. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). The Landis Brothers have not provided, and this court has not found, an

Eighth Circuit decision on this point. The appellant relies on the *Arakelian* decision to argue that the double bond requirement is unconstitutional and not rationally relating to securing the risk. The *Arakelian* court, however, found the double requirement unconstitutional or unreasonable only as applied to that appellant and those similarly situated. Appellant in this case does not profess an inability to pay. Thus, *Arakelian* does little to further their cause.

The statute's double bond requirement has *not* been repealed and *is* still effective. There is no evidence of appellant's inability to post the double bond. The appeal is statutorily deficient and, because of that deficiency, the appeal is not effective. *See* 7 U.S.C. §499g(c).

The court determines that the appeal is ineffective and, as such, the Landis Brothers' motion to dismiss the appeal is well taken. Therefore,

IT IS ORDERED that the Landis Brothers' motion to dismiss is GRANTED.

Dated this 9th day of April, 1990.

RODNEY S. WEBB, JUDGE
UNITED STATES DISTRICT COURT

In The United States District Court
For The District Of North Dakota
Northeastern Division

Landis Brothers, *Appellee,* v. Gregg Potato Sales, Inc., *Appellant.*	**CIVIL NO. A2-89-75**

JUDGMENT

Pursuant to the order entered this day in the above-captioned case,

IT IS ORDERED that Landis Brothers' motion to dismiss is granted.

Dated this 9th day of April, 1990.

EDWARD J. KLECKER, CLERK
UNITED STATES DISTRICT COURT

_____

Deputy Clerk of Court

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 9th day of April, 1990.

EDWARD J. KLECKER, CLERK

By: _____

Deputy

United States
Department of Agriculture
Before The Secretary of Agriculture

Landis Brothers, *Complainant,* v. Gregg Potato Sales, Inc., *Respondent.*	**PACA Docket No. R-88-4**

This is a reparation proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*.) A timely informal complaint was filed in which complainant seeks an award of reparation against respondent in connection with the sale of twenty-one (21) truckloads of potatoes, which were allegedly sold in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer denying liability, claimed that the transactions were consignments, claimed that the contract was entered into with Phillip Landis, Sr., the father of the complainants, and claimed a setoff relating to an amount owed by Phillip Landis, Sr., to respondent with respect to seed potatoes. Respondent raised a counterclaim, relating to the bill owed by Phillip Landis, Sr. Complainant filed a response to the Counterclaim.

An oral hearing was held on June 14, 1988, in Grand Forks, North Dakota. Both parties filed Post-Hearing Briefs.

FINDINGS OF FACT

1. Complainant is a partnership consisting of Philip Earl Landis, Jay M. Landis, and Robert Landis, doing business as Landis Brothers, and whose post office address is 815 Duke Drive, #433, Grand Forks, North Dakota 58201.

2. Respondent is a corporation whose post office address is P.O. Box 693, Crookston, Minnesota 56716. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about October 21, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 44,200 pounds of potatoes.

4. On or about October 21, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 24,000 pounds of potatoes.

5. On or about October 21, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 50,420 pounds of potatoes.

6. On or about October 21, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 47,320 pounds of potatoes.

7. On or about October 21, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 50,120 pounds of potatoes.

8. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 51,840 pounds of potatoes.

9. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 49,560 pounds of potatoes.

10. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 49,380 pounds of potatoes.

11. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 55,820 pounds of potatoes.

12. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 46,460 pounds of potatoes.

13. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 51,320 pounds of potatoes.

14. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 52,820 pounds of potatoes.

15. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 62,180 pounds of potatoes.

16. On or about October 22, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 48,420 pounds of potatoes.

17. On or about October 23, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 36,360 pounds of potatoes.

18. On or about October 23, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 12,620 pounds of potatoes.

19. On or about October 24, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural

product, consisting of 17,880 pounds of potatoes.

20. On or about October 24, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 21,160 pounds of potatoes.

21. On or about October 24, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 44,380 pounds of potatoes.

22. On or about October 24, 1986, complainant shipped to respondent, in contemplation of interstate commerce, one truckload of potatoes, a perishable agricultural product, consisting of 33,280 pounds of potatoes.

23. The complaint was filed on June 25, 1987, which was within nine (9) months after the cause of action herein accrued.

CONCLUSIONS

This case involves two primary issues: 1) what were the terms of the transaction and/or the relationship between the parties; and 2) whether this was a transaction between complainant and respondent or complainant's father and respondent. Respondent, as a setoff or counterclaim, raised a previous debt owed by Phillip Landis, Sr., father of the complainant.

Complicating matters is the fact that the transaction was primarily an oral transaction in which the documentation is sketchy, indeed. Complainants claim that the transactions were straight sales, at $3.25 per hundredweight. There is no dispute that Phillip Landis, Sr., did the majority of negotiating with respondent, as Phillip Landis, Sr., had a previous business relationship with respondent going back a number of years. Complainant's testimony, primarily through Phillip Landis, Sr., was that he clearly informed respondent that he was negotiating on behalf of his sons, complainant Landis Brothers, and not himself. Respondent claims, in its testimony, otherwise. However, respondent, by letter dated April 27, 1987, admits that it received "Landis Brother" potatoes, as distinct from "Phillip Landis, Sr." potatoes. This statement contradicts respondent's assertion that it did not know that the potatoes in question were respondent's rather than those of Phillip Landis, Sr. In addition, the internal documentation of respondent, in particular the load make up sheet, states that the potatoes were "Purchased from" rather than than being "Consigned By". It would have been relatively easy for respondent to have different documents for the different types of transactions, or, at the least, have some other method to indicate that the produce being shipped was being handled on a consignment basis.

It is obvious why respondent would want to take the position that the potatoes were handled for Phillip Landis, Sr., rather than for the complainant, Landis Brothers. An outstanding debt of over $9,000.00, owed by Phillip Landis,

Sr., for seed potatoes planted during June of 1985, was now almost two years old, and the decision by respondent *not* to pursue collection of the debt by legal means, was probably looking like a mistake. Once respondent has custody of the potatoes, and the proceeds realized from their sale, the likelihood of collecting part or the entire outstanding debt owed by Phillip Landis, Sr., would be maximized without the costly expense of trying to collect it through the legal process.

Respondent's claim that the sale was a consignment is difficult to accept, given the minimum of documentation which it presented. As a licensee under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), it is assumed to have notice of and understanding of the provisions of the statute as well as the regulations. Section 46.14(a) of the regulations (7 C.F.R. §46.14(a)) promulgated under the Perishable Agricultural Commodities Act, provides in relevant part:

> (a) Every commission merchant, dealer, and broker shall prepare and preserve for a period of two years from the closing date of the transaction the accounts, records, and memoranda required by the Act, which shall fully and correctly disclose all transactions involved in his business. Licensees shall keep records which are adapted to the particular business that the licensee is conducting and in each case such records shall fully disclose all transactions in the business in sufficient detail as to be readily understood and audited . . . . The responsibility is placed on every licensee to maintain records which will disclose all essential facts regarding the transactions in his business.

Section 46.15 of the regulations (7 C.F.R. § 46.15), which sets forth a listing of some of those records, clearly states that inspection certificates, and records of all rebates and allowances made and received in connection with shipments handled for the account of another, are part of the records required to be kept.

The respondent's lack of any documentation which would support its claim that some of the product arrived at its destination in a deteriorated condition, as was thus either rejected by the purchaser or respondent had to give substantial allowances, makes such claims by respondent particularly suspect. If respondent has been handling the potatoes on consignment for complainant, it would have obtained and kept such records to document such transactions. The lack of such records, in part, leads us to the conclusion that the transactions were sales, and not consignments.

The evidence further shows that upon delivery of the potatoes at the A & L Potato Company warehouse, operated by Thomas Bushee, the potatoes were inspected and they made grade, were washed and bagged. From the testimonial evidence presented by respondent, some of the potatoes were shipped to Florida, where, upon arrival they were rejected due to "wet rot". No documentary evidence was proffered by respondent, such as a Ryan recorder, to show transportation conditions were normal, nor did respondent present any credible and impartial evidence to show that the potatoes actually arrived in Florida with condition defects sufficient to take them out of grade. Respondent's self-serving testimony is not sufficient, particularly when the regulations specifically require inspection certificates or other documentation which is subject to being impartial and trustworthy.

The next question to be answered is the price at which the potatoes were sold to respondent. Complainant testified to a price of $3.25 per hundredweight. Complainant testified that is could sell all the potatoes it had to Frito-Lay, since it had a contract to supply the same type of potatoes, but ungraded, at $2.25 per hundredweight. Complainant presented evidence that showed the same variety of potatoes apparently passing the Frito-Lay quality assurance test in late January and early February, 1987, but such evidence is irrelevant to a determination as to what price the potatoes would have sold for in late October, 1986. The only way to determine whether the

price which complainant claimed was quoted by respondent for the potatoes is to examine the Market News. Although Market News for the period involved does not report, specifically, the F.O.B. shipping point price which Norchip variety potatoes were selling at in the Wisconsin and Red River Valley marketing area, the Market News for Madison, Wisconsin shows that for the week of October 26, 1986, U.S. No. 1 Wisconsin Round Whites, 100 pound sacks, were selling at $8.00. Although the price at which Norchip, U.S. No. 1 potatoes, for commercial use, would almost certainly be lower, the price testified to by complainant, $3.25 per hundredweight, is not unreasonable or out of line with the price quoted by the Market News. Therefore, we find that the price at which the potatoes were sold to respondent was $3.25 per hundredweight.

The final question remaining is whether respondent is entitled to deduct the amount of the outstanding debt of Phillip Landis, Sr., from the amount owed to complainants. Simply put, the answer is no. Respondent's counterclaim fails for two reasons, either of which is sufficient to cause us to hold against respondent.

Since the transaction which the debt relates is not related to the transactions involved in this proceeding, the debt is set-off. However, the Department's jurisdiction only extends to set-offs and counterclaims when an informal or formal complaint is filed with the Department within *nine* months of the date the cause of action arose. Respondent's documentation, consisting of a computer printout, shows that the Norchip Seed Bill was incurred on June 8, 1985. If we assume that the bill was to be paid within thirty (30) days, then the claim had to be filed, either informally or formally, with the Department, by April 8, 1986. The record indicates that the "Counterclaim" was first raised in respondent's answer, which was filed in September 15, 1987, an additional *seventeen months* after the cause of action arose. Secondly, respondent's "Counterclaim" is against Phillip Landis, Sr.. On the

basis of wrong party, we must also reject it.[1]

We have determined that respondent Gregg Potato is liable to complainant for $26,971.43, calculated on the basis of a total of 903,380 pounds of potatoes delivered and accepted by respondent. The price was $3.25 per cwt. for those potatoes delivered to respondent on complainant's vehicles, and $2.95 per cwt. for those potatoes hauled by Altendorf Trucking. Since complainant delivered four (4) truckloads, comprising 1072.4 cwt, such potatoes would be valued at $3,485.30, under the contract. Additionally, Altendorf Trucking delivered 7,961.40 cwt of complainant's potatoes to respondent, at a net price of $2.95, for a net amount of $23,486.13, or a total, for the 9033.8 cwt of potatoes of $26,971.43. Respondent's failure to pay complainant this amount is a violation of Section 2 of the Act, for which reparation should be awarded, with interest.

Complainant, as prevailing party, is entitled to reasonable fees and expenses in connection with expenses incurred in preparation for and conducting the oral hearing. Complainant has submitted a claim for such fees and expenses in the amount of $2,036.46. From an analysis of these claims, ten (10) of the hours of attorney expense are not permitted. Those ten, relating to the review of the transcript, research and preparation of the brief, and review and revision of the brief, are not permitted. Thus, the modified claim for legal fees is for seventeen hours at the rate of $75.00 per hour for a total fee of $1,275.00. The rest of the claim is not excessive, totaling $11.46, and such is found to be a reasonable expense within the meaning of

---

[1] We can surmise what happened with respect to this transaction. Once the debt for the seed potatoes was incurred by Phillip Landis, Sr. and payment was not forthcoming, respondent must have concluded that from all the information that was available that a legal proceeding to collect the debt would be non-productive, and was hoping that when Phillip Landis, Sr., was able to pay the debt, he would. Once respondent had custody of the potatoes involved here, it believed that this would be an opportune time to effect payment of the outstanding debt. In a sense, it is a variation of the inexact, but often valid expression: "Possession is nine tenths of the law."

the Act, for which respondent is liable, and to which complainant is, pursuant to section 7(a) of the Act (4 U.S.C. § 499g(a)), entitled to an award against respondent in the amount of $1,286.46.

ORDER

Within 30 days from the date of this order, respondent Gregg Potato Sales, Inc. shall pay to complainant the sum of $26,971.43, with interest thereon at the rate of 13% per annum from December 1, 1986, until paid.

Within 30 days from the date of this order, respondent Gregg Potato Sales, Inc. shall pay to complainant, as reparation for fees and expenses, $1,286.46, with interest thereon at the rate of 13% per annum from the date of this order, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

Done at Washington, D.C.
05 APR 1989

JUDICIAL OFFICER
Office of the Secretary

PERISHABLE AGRICULTURAL COMMODITIES REPARATION ORDER

Sec. 7 (b) If any commission merchant, dealer, or broker does not pay the reparation award within the time specified in the Secretary's order, the complainant, or any person for whose benefit such order was made, may within three years of the date of the order file in the district court of the United States for the district in which he resides or in which is 'located the principal place of business of the commission, merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. Such suit in the district court shall proceed in all respects like other civil suits for damages, except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit;

(c) Either party adversely affected by the entry of a reparation order by the Secretary may, within 30 days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held; Provided, That in cases handled without a hearing in accordance with paragraphs (c) and (d) of section 6 or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. Such appeal shall be perfected by the filing with the clerk of said court a notice of appeal, together with a petition in duplicate

which shall recite prior proceedings before the Secretary and shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed, with proof of service thereof upon the adverse party. Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approval list of sureties issued by the Treasury Department of the United States. The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify, and file in said court a true copy of the Secretary's decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall, upon filing in the district court, constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court:

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made

payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided,* That if on the appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgement on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

FILED
MAY 22 1991
OFFICE OF THE CLERK

No. 90-1702

In The

Supreme Court of the United States

October Term, 1990

GREGG POTATO SALES, INC.,

Petitioner,

vs.

LANDIS BROTHERS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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JURISDICTIONAL STATEMENT

The unpublished per curiam opinion was filed February 25, 1991, the Judgment dated February 25, 1991, and Mandate issued March 20, 1991 and filed March 27, 1991.

A Writ of Certiorari may be granted when a Federal Court of Appeals has rendered a decision in conflict with another Federal Court of Appeals in the same matter. The decision of the Eighth Circuit Court of Appeals is *not* in conflict with the decision of the Ninth Circuit Court of Appeals. Rule 10.1(a) of the Rules of the Supreme Court of the United States is not applicable.

STATEMENT OF THE CASE

After an administrative hearing before the Secretary of Agriculture, the adversely affected party, Gregg Potato Company, filed a Notice of Appeal and a Bond secured by a Certificate of Deposit which bears interest at 8.4% 7 U.S.C. §499g(c).

The Bond was not double the award as required by statute, but did cover the award, interest and costs.

Landis Brothers moved to dismiss the appeal for failure to file a Bond that was double the award. Gregg Potato Company responded it was filed under the authority of *O'Day vs. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir.1976).

The District Court held the appeal to be ineffective, the case of *O'Day vs. George Arakelian Farms, Inc.*, supra, distinguishable on the facts of this case, and ordered dismissal of the same. Gregg Potato Company filed its

Notice of Appeal to the Eighth Circuit Court of Appeal and filed a motion to set the amount of the Appeal and Cost Bond. The United States District Court for the District of North Dakota ordered an additional bond in the sum of $14,000.00 to be deposited and thereafter approved the Bond.

Upon the filing of the unpublished per curiam decision of the United States Court of Appeals affirming the trial court, the appellant herein sought a Writ of Certiorari to the United States Supreme Court.

STATEMENT OF FACT

A Complaint was filed by Landis Brothers against Gregg Potato Sales, Inc. on June 25, 1987 under the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. §499a, et seq.). Gregg Potato Sales, Inc. answered and counterclaimed for monies due it from Landis Brothers and Phillip Landis, Sr.

The Complaint alleged an oral contract for the sale of approximately 21 truckloads of bulk white Norchip potatoes at $3.25 cwt., less shipping charges, leaving a net sales price of $2.95 cwt. The Complaint also claimed that 9,038.8 cwt. were sold under the oral contract.

Respondent claimed that the oral contract was one of consignment, because the potatoes were frost damaged at the time of harvest and storage and had no value as No. 2 white potatoes and that Respondent agreed to attempt to market the potatoes on a consignment and brokerage basis. The Respondent also claimed thereafter it was

owed the sum of $9,856.00 for freight and seed potatoes sold, but not paid for.

A hearing was had before Donald A. Campbell, Judicial Officer of the Office of the Secretary of Agriculture. Hearing Officer Campbell found for the complainant on all counts. He thereafter ordered payment of $26,971.43 with interest at the rate of 13% from December 1, 1986 until paid; that he allowed Petitioner's reparation fees and expenses of $1,286.46 with interest at the rate of 13% on this amount from the date of the Order which totaled $36,769.62 on May 1, 1990.

Respondent timely filed a Notice of Appeal with the United States District Court, District of North Dakota, Fargo, North Dakota, on the 4th day of May, 1989, and filed the required Notice of Appeal, Petition, but only filed a supersedeas bond in the principal sum of $40,000.00 by way of a Certificate of Deposit that bears interest at the rate of 8.4% per annum.

Upon motion of the Respondent Landis Brothers, the District Court for the District of North Dakota dismissed the appeal upon the ground that the appeal was ineffective because an insufficient Bond had been filed.

REASON FOR DENYING THE WRIT

THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS

The Ninth Circuit Court of Appeals held in the case of *O'Day vs. George Arakelian*, 536 F.2d 856 (9th Cir.1976) the requirement of a bond of double the amount of the

reparation award, plus interest, costs and attorney's fees awarded is unconstitutional only as applied to would-be appellants unable to afford such a bond. The Eighth Circuit Court of Appeals' decision is not in conflict with the *Arakelian* decision, it merely distinguished it on the facts by pointing out "Gregg has never claimed that it is unable to pay for a bond in the proper amount." Petitioner's appendix, page A-2.

PETITIONER IS RAISING AN ISSUE NEVER RAISED BELOW REGARDING FINANCIAL INABILITY

Petitioner states at page six of its brief, "had the appellant been obligated to file a bond in the sum of double the amount, a bond in the sum of $80,000.00 would have had to have been filed *which would have been financially impossible for the appellant to do.*" (Emphasis Added).

The order of the U.S. District Court for the District of North Dakota clearly stated:

> The appellant relies on the *Arakelian* decision to argue that the double bond requirement is unconstitutional and not rationally relating to securing the risk. The *Arakelian* court, however, found the double requirement unconstitutional or unreasonable only as applied to that appellant and those similarly situated. *Appellant in the case does not profess an inability to pay.* Thus, *Arakelian* does little to further their cause. Petitioner's appendix, Page A-6. (Emphasis Added).

Likewise, the order of the Eighth Circuit clearly stated:

> Gregg relies now, as it did below, on *O'Day vs. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th

> Cir.1976), which held that double bond requirement of § 499g(c) was unconstitutional. As the district court pointed out, however, the *Arakelian* court found the requirement of a bond of double the award unconstitutional only as applied to would-be appellants unable to afford such a bond. *Gregg has never claimed that it is unable to pay for a bond in the proper amount.* We therefore affirm the district court. Petitioner's appendix, page A-2. (Emphasis Added).

Gregg Potato Sales, Inc. is now, for the first time, raising the issue of its inability to provide a double bond in its petition for a Writ of Certiorari.

PETITIONER IS RAISING AN ISSUE NEVER RAISED BELOW REGARDING LACK OF JURISDICTION

Gregg Potato Sales, Inc. is now for the first time raising the issue of whether there was jurisdiction under the Perishable Agricultural Commodities Act of 1930. Obviously, if this issue had been raised by Gregg Potato at either the administrative hearing level, the appeal to the United States District Court, or the appeal to the Eighth Circuit Court of Appeals, it would have been addressed. It was never raised and hence never addressed. Please see U.S. Department of Agriculture Decision and Order at page A-8 of Petitioner's appendix, U.S. District Court for North Dakota Order and Judgment at page A-5 of Petitioner's appendix, and Eighth Circuit Per Curiam Opinion at page A-1 of Petitioner's appendix.

Gregg Potato is incorrect when it states, " . . . the potatoes had spoiled in a warehouse in Grand Forks, North Dakota . . . ". (Page II of Petition). The potatoes were stored at the A & L Potato Company warehouse,

operated by Thomas Bushee. Petitioner's appendix, page A-14.

At the hearing held in Grand Forks, North Dakota on June 14, 1988, Jim Gregg testified and identified himself as the secretary-treasurer or Gregg Potato Sales. (Hearing Transcript, page 9). Jim Gregg testified the potatoes were trucked from the Landis Farm to eight warehouses Gregg Potato "had lined up" in East Grand Forks (Minnesota). (Hearing Transcript, page 26).

Landis Brothers farmed in Grand Forks County, North Dakota. Gregg Potato Sales, Inc. is located in Crookston, Minnesota (Petitioner's brief, page II). The potatoes were stored in East Grand Forks, Minnesota until Gregg Potato Sales started selling them to third parties and shipping the potatoes to places such as Plant City, Florida, Clio, Minnesota, Clark, South Dakota, Rhinelander, Wisconsin, Kansas City, Missouri, Harahan, Louisiana, and Norwalk, Ohio. (Please see Gregg Potato Sales, Inc's Exhibit I received at the June 12, 1988 hearing).

CONCLUSION

Gregg Potato Sales, Inc. has raised two new issues in its petition for the writ of certiorari: that it could not financially afford to post a bond in double the amount of the total reparations award, and that Landis Brother's claim did not fall within the jurisdiction of the Perishable Agricultural Commodities Act of 1930. It should not now be allowed to raise those two issues.

This Court has articulated a general rule that "an appellate court does not give consideration to issues not raised below." *Hormel vs. Helvering*, 312 U.S. 552, 556 (1941). The *Hormel* court recognized that the judicial system is structured in such a way that the trial court sees the evidence, hears the testimony and the arguments and then decides the issues presented to it. *Id.* The appeals courts cannot decide issues without evidence and at the appellate level the parties have no opportunity to present it. *Id.* "Recognition of this general principle has caused this court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the (lower courts)." *Id.*

After giving recognition to this general principle, this Court went on to admit that inflexible rules may result in a defeat of justice under some circumstances. *Id.* at 557-58. Circumventing the rule to prevent "a plain miscarriage of justice," *id.* at 558 became one of the components of a test alluded to in *Singleton vs. Wulff*, 428 U.S. 117, 121 (1976), which determines when issues may be raised and resolved for the first time in a court of appeals. The court specifically noted that the matter would be left to the discretion of the appellate courts on a fact specific basis. The guiding considerations consist of determining 1) whether injustice might otherwise result, *see, Hormel vs. Helvering*, or 2) whether the proper resolution is beyond any doubt. *Singleton vs. Wulff*, 428 U.S. at 121.

It would clearly be unjust to allow Gregg Potato Sales, Inc. to now raise the issue as to whether in May of 1989 it had sufficient assets to file the appeal bond in the required amount, and to let it also raise a jurisdictional

issue which had already been decided at the hearing before the Office of the Secretary of Agriculture.

Gregg Potato Sales, Inc. has also stated this writ of certiorari should be granted to resolve the conflict in decisions between the Ninth Circuit Court of Appeals in the *Arakelian* case, supra, and the Eighth Circuit Court of Appeals in this case. That is incorrect. The Eighth Circuit Court of Appeals distinguished this case on the facts from the *Arakelian* case, supra, it did not disagree with the holding.

Landis Brothers respectfully request this Court deny the petition for the writ of certiorari.

DATED: May 22, 1991.

Respectfully submitted,

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